In the Supreme Court of the United States

OCTOBER TERM, 1976

BENJAMIN EISENSTADT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals rendered no opinion.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1976. The petition for a writ of certiorari was filed on July 16, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support petitioner's convictions for making false declarations before a grand jury.

2. Whether false and evasive testimony before the grand jury in this case constituted an obstruction of justice.

3. Whether the trial court abused its discretion in denying petitioner's request for an overnight adjournment at the conclusion of the government's case.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of three counts of making false declarations before a grand jury, in violation of 18 U.S.C. 1623, and of one count of obstructing justice during his grand jury appearance, in violation of 18 U.S.C. 1503.[1] He was sentenced to concurrent terms of 18 months' imprisonment and fined $1,500 on each count. The court of appeals affirmed without opinion.

On May 6, 1975, petitioner appeared (under subpoena) before a federal grand jury that was investigating extortionate credit transactions. After being granted immunity pursuant to 18 U.S.C. 6001 to 6003, petitioner answered questions about usurious loans, the use of extortionate means to collect such loans, and his knowledge of illegal gambling operations.

Petitioner acknowledged that he loaned money but did not name any persons to whom he had done so. He testified that he paid no attention to names, because in his "type of business you just forget about people that owe you money" (G. Tr. 28);[2] he also testified that he could not recall the last names of any individuals to whom he had loaned money (G. Tr. 32-33). He said that his debtors came to him to make repayment, that he "never threatened

[1]The jury acquitted petitioner on another count charging a violation of 18 U.S.C. 1623.

[2]"G. Tr." designates the transcript of petitioner's appearance before the grand jury. "Tr." refers to the transcript of petitioner's trial.

anybody in [his] life" (G. Tr. 28), and that he never had said "you must pay me or anything like that" (G. Tr. 38). Petitioner testified that he had not loaned more than $500 at one time to any individual save one, known to him only as "Jack" (G. Tr. 36-37).

The indictment charged that petitioner made false declarations by stating that he never threatened anyone or sought after his debtors for repayment, that he did not know the last names of the persons to whom he loaned money, and that he had loaned more than $500 only to a person known as "Jack."

Petitioner also testified before the grand jury that he did not recall how much he had ever loaned to one person, how long he has been lending money, how many people he has loaned money to, the full names of any of his borrowers, the name of the last person to whom he loaned money, and the place where he initially met a borrower he identified as "Whity." Petitioner's refusal to supply information about these aspects of his money lending activities was the subject of the obstruction of justice charge.

The uncontradicted testimony at trial showed that in 1968 petitioner loaned Robert Aronowitz $30,000; Aronowitz was to pay $600 a week for each week the loan was outstanding and to repay the $30,000 in a lump sum (Tr. 73-74, 111). Petitioner personally came to Aronowitz's office to collect the first payment and to obtain Aronowitz's signature on a promissory note, which Aronowitz signed with his full name (Tr. 77-79, 93-94). Over a four-year period, at his place of business, Aronowitz made weekly payments of $600 each, for a total of more than $125,000, to petitioner or petitioner's brother (Tr. 81). Aronowitz then ceased making payments, moved, and did not inform petitioner of his new place of business, but petitioner soon appeared there and demanded repayment. They then agreed

upon a reduced weekly payment schedule, and Aronowitz again made payments directly to petitioner or his brother for approximately three months. Petitioner visited Aronowitz once more, and they agreed to a further reduced payment schedule of $25 per week, which was paid for "a few" weeks (Tr. 86-91).[3]

The evidence also showed that in 1972 petitioner loaned Michael Dubler $1,000, repayable in ten weekly installments of $120 each. When Dubler defaulted after making a number of installment payments that had been collected by petitioner's brother, petitioner telephoned Dubler and, in very strong language, insisted upon payment of the installment plus a cash penalty. When Dubler missed the next installment, petitioner came to Dubler's store, demanded payment, and threatened that "someone would come down and see [him]" (Tr. 35-41).

ARGUMENT

1. Viewed in the light most favorable to the government, the evidence was ample to support petitioner's convictions for making false declarations under 18 U.S.C. 1623. Petitioner testified before the grand jury that he never sought out persons who owed him money and that he neither demanded payment nor threatened anyone. Both Dubler and Aronowitz testified that on more than one occasion petitioner came to their respective places of business, attempted to collect money from them, and pressured them to continue making weekly payments. Both witnesses denied ever having sought out petitioner to make their payments (Tr. 89). Dubler explicitly testified that petitioner had threatened him in an angry face-to-face confrontation.

[3]Aronowitz testified that he later borrowed an additional $7,000 from petitioner in exchange for a share in a new business venture. The loan was never repaid (Tr. 94-95, 114-116).

Petitioner had testified that he did not know the last name of his debtors, but Aronowitz testified that he told petitioner his last name and that he signed his full name to a promissory note, which petitioner retained. Petitioner was able to locate Aronowitz at his new place of business, although Aronowitz had not furnished his new location to petitioner or his brother. This evidence, together with the long-term nature and the amount of the loan, was ample to support the verdict.

Petitioner testified before the grand jury that he had loaned more than $500 on only one occasion, to an individual whose first name was "Jack." But Michael Dubler and Robert Aronowitz testified that neither had identified himself to petitioner as "Jack" (Tr. 43, 93-94) and that they had borrowed sums of $1,000 and $30,000. *Bronston* v. *United States*, 409 U.S. 352, upon which petitioner relies, is not in point. Bronston gave literally true (but unresponsive and misleading) answers to vague questions. Here, by contrast, petitioner explicitly denied having threatened anyone, denied having personally collected money from his debtors, denied knowledge of Aronowitz's last name, and denied having loaned more than $500 to anyone but "Jack." None of this was true.[4]

[4]Petitioner's contention that he should have been warned that he might be indicted for perjury if he testified falsely is without merit. The prosecutor has no duty to warn a grand jury witness of the penalties for violating his oath to tell the truth. *United States* v. *Del Toro*, 513 F. 2d 656, 664 (C.A. 2), certiorari denied, 423 U.S. 826; see also *United States* v. *Mandujano*, No. 74-754, decided May 19, 1976. Moreover, petitioner was twice warned that under the grant of immunity he remained vulnerable to prosecution for perjury (G. Tr. 5-6).

There is no argument here that petitioner should have been given a "target" warning. The grant of immunity excluded any possibility that petitioner was a "target."

2. Petitioner's contention that his evasive testimony and persistent failure of recollection did not obstruct the grand jury investigation is unpersuasive. 18 U.S.C. 1503 forbids all conduct that corruptly impedes or obstructs the due administration of justice. *United States* v. *Cohn,* 452 F. 2d 881, 883-884 (C.A. 2), certiorari denied, 405 U.S. 975; *United States* v. *Walasek,* 527 F. 2d 676, 678-681 (C.A. 3) (collecting cases). As the court observed in *United States* v. *Alo,* 439 F. 2d 751, 754 (C.A. 2), certiorari denied, 404 U.S. 850:

> The blatantly evasive witness achieves [the deliberate frustration through corrupt or false means of an attempt to gather relevant evidence] as surely by erecting a screen of feigned forgetfulness as one who burns files or induces a potential witness to absent himself.

This Court held in *In re Michael,* 326 U.S. 224, 229, that perjury before a grand jury, without the additional element of obstruction of justice, could not be punished as contempt of court. *United States* v. *Essex,* 407 F. 2d 214 (C.A. 6), relied upon by petitioner, viewed Section 1503 as a substitute for contempt and applied the *Michael* rationale to a false affidavit filed on a motion for a new trial. Although we submit that *Essex* adopts an incorrect legal theory, it is plain that that case affords no assistance to petitioner; here the judge charged the jury that it had to find not only that petitioner gave false and evasive answers but also that petitioner willfully endeavored to influence, obstruct or impede the official inquiry undertaken by the grand jury (Tr. 193-194). A charge of that sort apparently would have satisfied the *Essex* court.

3. Finally, there is nothing to petitioner's contention that the trial court abused its discretion in denying his request for an overnight continuance in order to determine

whether he should testify and to enable counsel to prepare a summation. Petitioner's counsel is not entitled to interrupt a trial for lengthy periods to make decisions of this sort or engage in ordinary trial preparation. The prosecution's case was brief, taking less than a day to present; the court already had accommodated defense counsel by beginning the trial late and recessing it for half an hour at one point. The court granted a ten-minute recess to allow counsel to decide whether petitioner would testify; counsel had indicated that such a recess would be sufficient (Tr. 123). After the recess the defense announced that it would rest (Tr. 124). Counsel then requested the overnight continuance to prepare a summation. The court denied the request but granted an additional ten-minute recess to permit counsel time to prepare a closing argument (Tr. 127).

The trial court has broad power to control the pace of trial. *Geders* v. *United States,* 425 U.S. 80. The grant of a recess or a continuance is committed to the sound discretion of the trial court and will not be disturbed on appeal except for a clear abuse. *Ungar* v. *Sarafite,* 376 U.S. 575, 586. In the present case the issues were simple, the government had presented only four witnesses in the space of a single day, and the court had already been generous in accommodating counsel. The court was not required to grant an overnight continuance.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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